United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-2106

To be argued by
Edward M. Chikofsky

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Number 76-2106

JOHN STANLEY WOJTOWICZ,

Appellant,

— against —

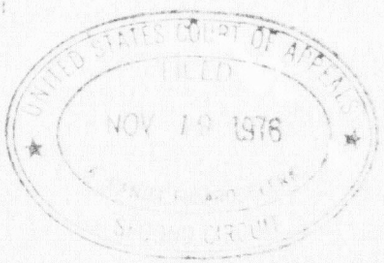
UNITED STATES OF AMERICA,

Appellee.

B
P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT



EDWARD M. CHIKOFSKY
Attorney for Appellant
John Stanley Wojtowicz
410 Park Avenue
New York, New York 10022
(212) 355-2380

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Miscellaneous Authority

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN STANLEY WOJTOWICZ, :

Appellant, :

-against- : Docket No.: 76-2106

UNITED STATES OF AMERICA, :

Appellee. :

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal, pursuant to Title 28 United States Code §2255, by John Stanley Wojtowicz ("Wojtowicz"), a federal prisoner presently incarcerated at the Federal Correctional Institution, Lompoc, California, from an order entered on January 16, 1976, by the United States District Court for the Eastern District of New York (Hon.

Thomas C. Platt, Jr., J.), which denied, without an evidentiary hearing, Wojtowicz' motion to vacate his judgment of conviction, pursuant to 28 U.S.C. §2255.* The decision of Judge Platt has not been reported and is reproduced as Exhibit 3 in the Appendix of this brief.

By order dated September 1, 1976, this Court granted leave to appeal in forma pauperis and the assignment of counsel. On September 14, 1976, by order of the Honorable Wilfred Feinberg, United States Circuit Judge, the undersigned was appointed under the Criminal Justice Act (18 U.S.C. §3006A(g)) as counsel for Wojtowicz on appeal.

Questions Presented

1. Did the District Court err in dismissing, without an evidentiary hearing, Wojtowicz' claim that his guilty plea was involuntary, in light of his psychiatric background and suicide attempt immediately prior to sentencing.

---

* By supplemental memorandum and orders of February 26, 1976, March 3, 1976 and June 16, 1976, Judge Platt denied various pro se motions for reconsideration and transfer pending appeal.

2. Did the District Court err in failing to consider Wojtowicz' related claim that he was denied the effective assistance of counsel.

Proceedings Below

On February 16, 1973, Wojtowicz was convicted in the United States District Court for the Eastern District of New York (Travia, J.) upon his plea of guilty to the second count of a four-count indictment, charging him with armed bank robbery, in violation of 18 U.S.C. §2113(d).* On April 23, 1973, Wojtowicz was sentenced by Judge Travia to a term of twenty years' imprisonment. No appeal was taken from this conviction.

On October 21, 1975, Wojtowicz filed the instant §2255 petition, alleging, inter alia, that his guilty plea was induced by a sentence promise conveyed by his attorney, as well as by pressure exerted by his family. The government filed an affidavit in response on November 26, 1975.

---

* The indictment (72 CR 1056), dated August 31, 1972, charged Wojtowicz and a co-defendant, Robert Westenberg, with three counts of bank robbery and one count of conspiracy, in violation of 18 U.S.C. §§ 2113(a), (d), (e) and 371. The third count, as discussed infra, carried a possible death penalty.

On January 16, 1976, by Memorandum and Order, the District Court dismissed Wojtowicz' petition without an evidentiary hearing.* Characterizing counsel's promise as nothing more than a sentence-estimation, the court below held Wojtowicz' claim insufficient, in the absence of substantial objective evidence that the sentence-estimate was conveyed as a promise from either the court or the government. Curiously, however, the District Court never addressed Wojtowicz' related claim that, based in part upon counsel's sentence promise, his family exerted pressure upon him to plead guilty.

Wojtowicz subsequently moved for reconsideration of the District Court's opinion, submitting therewith a handwritten pro se affidavit, dated January 27, 1976,** in which he related, for the first time, the details of his suicide attempt at the West Street Detention Center, in the early-morning hours of April 23, 1973, immediately prior to his sentencing. By order dated February 26, 1976, the District Court denied reconsideration. Notice of Appeal was filed, by direction of the District Court, on March 22, 1976.

---

* Judge Travia having resigned from the Federal Bench in November, 1974, the instant §2255 petition was assigned to Judge Platt.

** Exhibit 10 (Appendix). The pro se affidavit was not docketed and filed by the District Court until February 17, 1976.

Statement of the Case

August 22, 1972: Dog Day Afternoon*

> Tuesday, August 22, 1972 . . . As historical footnotes go, it was the summer night America watched Sammy Davis, Jr. plant a kiss on Richard Nixon, the most spontaneous moment all evening on the telecast of the G.O.P. renominating convention in Miami. Up in New York, however, folks were getting cops-'n'-robbers suspense when reports of a stick-up in progress at a Chase Manhattan Bank periodically flashed on the tube, even in the middle of the President's acceptance speech.
>
> There he was, swaggering, boyish gunman who could easily pass for Al Pacino, lecturing reporters on the death penalty, then pacing the sidewalk screaming "Back off!" at the cops, while calling the FBI into bargaining chats concluded with a handshake, while his partner, Sal, held a gun on hostages inside the bank. C. Jahr, Dog Day Aftermath, Playboy Magazine, August 1976, at 128-129.

The scene of this bizarre vigil was an unprepossessing neighborhood branch of the Chase Manhattan Bank on Avenue P and East Third Street, in Brooklyn. Wojtowicz, along with two confederates, Salvatore Naturale and Robert Westenberg, entered the local bank

---

* The exploits of Wojtowicz, and the events that transpired as part of the instant bank robbery, formed the basis of the popularly-acclaimed motion picture, Dog Day Afternoon, starring Al Pacino. See also, P. Mann, Dog Day Afternoon (1974).

branch late on a scorchingly-hot August afternoon with the idea of quickly lifting some loose cash, thereupon to make the customary swift departure with the proceeds of their ill-gotten pelf.

But, in the best tradition of Mack Sennett and the Keystone Kops, their plans backfired. Whether through the intervention of a chance spectator happening by, or the purposeful triggering of the bank's silent alarm, the police were notified and arrived on the scene while Wojtowicz and his confederate, Sal, were still in the bank.* Thus confronted with the prospect of imminent capture, Wojtowicz and Sal proceeded to barricade themselves inside the bank, holding the bank employees as hostages.

Thereupon, in the tense confrontation that surrounded the bank under siege by law enforcement authorities, unfolded a scenario at once so bizarre and tragicomic as to render it almost too improbable and hopelessly far-fetched for the proverbial Hollywood screenplay.

---

* Westenberg, having lost his nerve, departed the bank at the very beginning of the heist.

Wojtowicz, it transpired, was leading a double life. Separated from his wife Carmen, and their two children, Wojtowicz had taken up a nomadic existence in the nether world of Greenwich Village's gay community. He had formed a homosexual liason with one Ernest Aron, and the two had become lovers.*

Aron, a tall, willowy transvestite known to the gay community as Liz Eden, had long suffered an identity crisis psychiatrically diagnosed as sexual-orientation disturbance. Feeling like a woman trapped in a man's body, she found psychotherapy unavailing, and sought, instead, a sex-change operation as the only satisfactory resolution of her plight.

Such operations, however, are not inexpensive propositions. Wojtowicz, seeing Aron's growing desperation - there were several suicide attempts - tried to raise money for the operation through conventional channels, either by loans or borrowing through his previous employer (he had worked as a bank teller-trainee for several years). All was to no avail.

As the finances evaporated, so did the romance, and Aron again attempted suicide, this time on his birth-

---

* The two were, in fact, "married" at a gay ceremony performed by a priest in 1971, which Wojtowicz' mother, among others, attended. The priest has since been excommunicated.

day, August 20, 1972: two days before the instant bank robbery.

Wojtowicz, desperate beyond distraction, saw only one solution to his, and Aron's, plight. He planned the bank robbery as the only avenue left to raise money for Aron's sex-change operation. Enlisting Sal and Westenberg, they selected the Avenue P branch of the Chase Manhattan Bank as a likely target.

The caper did not turn out as planned, however. As the hours dragged on within the bank; as the police and FBI tirelessly negotiated the release of the hostages from across the street; as the news media broadcast live developments -- making this the most widely televised on-going criminal venture since the shooting of Lee Harvey Oswald; and as the bizzare nature of Wojtowicz' relationship with Aron revealed itself (he was brought to the scene from Kings County Hospital's psychiatric ward, where he had been taken after his suicide attempt); events drew inexorably to an impending climax.

Inspired, no doubt, by the tactics of foreign hijackers, Wojtowicz, in a fit of bravado, demanded that an airplane transport him and the hostages to an

undesignated foreign country. Seemingly acquiescing in this scheme, the FBI arranged to transport Wojtowicz, Sal and the hostages to Kennedy Airport via airport limousine.

Once arrived, the limousine driver (an incognito FBI agent) passed a prearranged signal to fellow agents, who moved in at the moment of disembarkation. In the ensuing melee, Wojtowicz was captured unharmed. Sal, however, was shot and killed. No hostage was harmed in any way.

Indictment and Plea

Wojtowicz, a first offender with no prior criminal involvement, was subsequently arraigned on a four-count indictment charging him with three counts of bank robbery (18 U.S.C. §§2113(a), (d), (e)) and one count of conspiracy (18 U.S.C. §371). Because hostages were taken, the third count of the indictment, brought under 18 U.S.C. §2113(e), mandated the death penalty, if so directed by the jury.

On September 12, 1972, at the request of Wojtowicz' court-appointed attorney, the District Court

directed a psychiatric examination of Wojtowicz, pursuant to 18 U.S.C. §4244, in order to ascertain his then-mental competence. The examination was conducted at Kings County Hospital and the resultant report, while noting his previous psychiatric treatment at St. Vincent's Hospital because of prior suicidal incidents, found him to be presently competent to stand trial.

There is no indication on the record that Wojtowicz' attorney contested this report. Nor is there any indication that counsel ever consulted with a psychiatric expert (available under 18 U.S.C. §3006A (e)) in order to explore the only possible defense realistically available under the bizarre circumstances of this case: insanity. Rather, court-appointed counsel recommended to Wojtowicz, and his family, the simple expedient of a guilty plea.

Guilty Plea

The circumstances surrounding the guilty plea suggest that the influence of Ernest Aron, rather than that of Wojtowicz' mother and wife, played the most significant role in bringing about the plea of guilty.

According to affidavits submitted to the court below by Aron and Wojtowicz' mother and wife,* they pressured him to plead guilty in order to save him from the prospect of twenty-five years in prison. Besides recounting Wojtowicz' prior psychiatric treatment at St. Vincent's Hospital for suicide attempts, the affidavits reveal that the family's primary motivation in pressuring Wojtowicz was counsel's promise that Wojtowicz would receive only ten to fifteen years' imprisonment. In fact, he received twenty years.

Contemporaneous journalistic accounts of plea and sentence, submitted to the court below,** suggest yet another motivation for the guilty plea - a motivation reflecting the bizarre and unhealthy psychological dynamics between Wojtowicz and Aron:

> Littlejohn said he had left the decision regarding his plea up to Ernest Aron, who was undergoing his sex-change operation.
>
> "Ernie convinced me to plead guilty," Littlejohn insisted. [Counsel] said that if I pleaded guilty, he would give me the money [from the movie rights] and request that Ernie be allowed to visit me in

---

* Exhibit 7 (Appendix)

** Exhibit 11 (Appendix).

> prison. [Counsel] brought Ernie down for a contact visit on January 9th to give me the business, and I had no choice. If I didn't plead guilty, Ernie might have left me. They told me I would see Ernie sooner if I pleaded guilty."
>
> R. Wicker, The Boys in the Bank, ERA Magazine, April 1974, at 11.*

Wojtowicz pleaded guilty on the second count of the indictment before Judge Travia on February 16, 1973. The plea minutes** reveal that, in addition to eliciting a factual basis for the crime charged, as well as perfunctorily inquiring into the plea's voluntariness, Judge Travia also became aware of Wojtowicz' prior psychiatric treatment at St. Vincent's Hospital. Judge Travia, however, did not follow this up with any substantial further inquiry into Wojtowicz' present mental state.

The Court also elicited from counsel the rather astonishing admission that, after having represented Wojtowicz for approximately six months, counsel had only discovered, on the morning of the plea, that his client faced the possibility of the death penalty on the third count of the indictment:

---

* Exhibit 11 (Appendix).

** Exhibit 4 (Appendix).

> THE COURT: Is he aware that one of the charges, a violation of 2113(e) could carry up to a death penalty?
>
> [COUNSEL]: He was aware of it from this morning, your Honor. As a matter of fact, I think I just became aware of it rather recently myself. I had understood that there was a possible life penalty, but the fact that there was someone whose life was taken during the commission of this act would indicate --
>
> THE COURT: The statute says or someone in custody as a hostage, and there was a hostage here.
>
> [COUNSEL]: That's right. Under those circumstances, there is a possibility of that penalty.
>
> THE COURT: Which, of course, would have to be directed by a jury verdict.
>
> Plea Minutes, at 17-18.*

While the actual Rule 11 colloquy between the Court and Wojtowicz appears to be facially unexceptionable, contemporaneous journalistic accounts, submitted to the Court below, suggest the ominous spectre of undue influence exerted over Wojtowicz:

> Littlejohn said that when Judge Travia questioned him, he looked back at Ernie. If Ernie wanted him to say yes, he nodded; if Ernie shook his head "no", he said no.

---

* Exhibit 4 (Appendix).

* * * *

> . . . During the February 16th pleading, Littlejohn looked over at Aron so frequently that Judge Travia at one point became angry and shouted at him: "Look at me!"
>
> R. Wicker, The Boys in the Bank, supra.*

Indeed, the plea minutes reveal that, at one point, Judge Travia did, in fact, state to Wojtowicz, "Look at me." (Plea minutes, at 15.)

Despite these most unusual circumstances, Judge Travia accepted Wojtowicz' guilty plea without any further inquiry, finding it to be properly voluntary, as well as finding a sufficient factual basis therefor.

Suicide Attempt and Sentencing

Sentencing was scheduled for Monday, April 23, 1973. It was at this juncture, normally the final stage of the criminal process, that matters took their most unusual turn.

According to Wojtowicz**, at 3:00 a.m. on the morning of sentencing, he swallowed 100 pills, consisting

---

* Exhibit 11 (Appendix).

** The factual allegations concerning Wojtowicz' suicide attempt were first brought to the attention of the Court below in Wojtowicz' handwritten pro se affidavit, dated January 27, 1976 (Exhibit 10, Appendix). However, these allegations are corroborated by numerous contemporaneous press accounts of the sentencing. See R. Wicker, The Boys in the Bank, supra, [Exhibit 11, Appendix], submitted to the Court below.
[Footnote continued on following page.]

Benedrals and Darvons. When it appeared that the pills were not having the desired effect, he thereupon proceeded to slash his wrists and forearms with a razor blade. Apparently, he passed out from shock.

Discovered while unconscious by marshals at the West Street Detention Center, he was rushed to St. Vincent's Hospital in the middle of the night, stitched up, medicated and returned to West Street by morning. Apparently a discussion ensued as to whether he should be sent to court at all, in light of his deteriorated condition. In any event, the decision to proceed was made by West Street personnel, and he was bandaged, manacled and dispatched to court for sentencing.

Incredibly, Wojtowicz' attorney made no mention at sentencing of his client's suicide attempt. Neither was Judge Travia motivated to inquire into the reasons for Wojtowicz' obviously-deteriorated physical appearance. In light of the fact that all the various journalistic accounts of the sentencing, supra, mention the suicide

---

[Footnote continued from preceding page.]

See, e.g, The New York Times, April 24, 1973, p. 81, col. 6:

> . . . The wrists of the slender, 28-year old defendant were bandaged and it was reported that he had slashe[d] them in a suicide attempt at 4:00 a.m. in his cell at the Federal Detention Center . . . His mother, Terry, and his wife, Carmen, cried out in surprise as Wo[j]towicz was brought into the building and they saw the bandages . . . . Id.

See, also, C. Jahr, Dog Day Aftermath, supra, at 142.

attempt as well as the blood-soaked bandages wrapped around Wojtowicz' wrists, such silence on the part of counsel and the Court cannot reasonably be explained.

Furthermore, as sentencing proceeded, it soon became apparent that this was to be no routine colloquy between court, counsel and defendant.

Three weeks earlier, Wojtowicz had written Judge Travia a letter in which he requested a new lawyer. Apparently, relations between Wojtowicz and his attorney had deteriorated seriously, provoked in part by Wojtowicz' feeling that he had been pressured to plead guilty and that the attorney (originally appointed under the Criminal Justice Act but now on retainer out of the proceeds of the sale of the movie rights) was more concerned with negotiating the movie and book rights than with adequately representing his interests.* Wojtowicz repeated his dissatisfaction at sentencing, and his attorney confirmed that his client would no longer speak with him.

Judge Travia thereupon queried Wojtowicz on whether he wished to retract his plea, making clear that

---

* Wojtowicz' attorney, in fact, "negotiated" the sale of the movie rights to Dog Day Afternoon, which has grossed, to date, over $20 million, for the paltry sum of $7,500. Part of the proceeds were used to pay for Aron's sex-change operation.

he was disinclined to provide Wojtowicz with substitute counsel. After a lengthy colloquy, in which Wojtowicz expressed confusion as to which course to take, the Court gave him a brief opportunity to consult with his present attorney to decide whether he wished to withdraw his plea or take some other course of action.

Not surprisingly, given Judge Travia's expressed disinclination to appoint substitute counsel, Wojtowicz withdrew his objections and acquiesced in his prior plea. At that time, Judge Travia engaged Wojtowicz in a Rule 11 colloquy on his previously-entered plea. As and for his allocution, he engaged in a strangely eloquent, but totally inappropriate disquisition on the meaning of love, stating that he had committed the crime to save Ernest's life.* Judge Travia thereupon sentenced him to 20 years' imprisonment.

Wojtowicz' attorney, while inexplicably having failed to mention the suicide attempt at sentencing, belatedly brought the matter to the Court's attention in a Rule 35 motion, filed four months later:

---

* Wojtowicz' pro se affidavit, supra, further states that he hardly remembers what transpired at sentencing because he kept fading in and out. The Wicker news article, supra, also refers to his grogginess at sentencing.

> In addition, at the time of sentence, the defendant (Mr. Wojtowicz) was in poor physical condition having inflicted injuries upon himself just prior to sentence, and was in a highly nervous state during which he made certain statements which may have inadvertently antagonized the court. Id. [Exhibit 6, Appendix].

Judge Travia denied the Rule 35 petition on October 5, 1973.

POINT I

THE DISTRICT COURT IMPROPERLY DENIED AN EVIDENTIARY HEARING ON THE VOLUNTARINESS OF WOJTOWICZ' GUILTY PLEA

The District Court improperly denied an evidentiary hearing in this case, where Wojtowicz' allegations of his attempted suicide at sentencing, taken in conjunction with his prior psychiatric background, and the bizarre circumstances surrounding plea and sentence, cast substantial doubt upon his competence and voluntariness in pleading guilty.

A. The District Court Improperly Denied an Evidentiary Hearing in the §2255 Proceeding Below

The District Court improperly denied an evidentiary hearing in the §2255 proceeding below, despite

the detailed factual allegations contained in Wojtowicz' affidavit, none of which are controverted by the files and records of the case. This disposition was particularly inappropriate here, where the affidavit was accompanied by independent corroborative documentation, in the form of contemporaneous media accounts, implicitly requiring the Court to consider matters dehors the record in order to resolve the question.

28 U.S.C. §2255 provides, in pertinent part:

> . . . . Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto . . . . Id.

An evidentiary hearing ordinarily is required in a §2255 proceeding unless the allegations are insufficient in law, undisputed, immaterial, vague, conclusory, palpably false or patently frivolous, Sanders v. United States, 373 U.S. 1, 19 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Machibroda v. United States, 368 U.S. 487, 494 (1962); United States v. Malcolm, 432 F.2d 809, 812 (2d Cir. 1970).

Certainly, Wojtowicz' claims are by no means insufficient in law. It is manifest that the issue of mental incompetency at the time of trial (or plea) and sentencing can be challenged by a motion under 28 U.S.C. §2255. Bishop v. United States, 350 U.S. 961 (1956); Sanders v. United States, supra; Saddler v. United States, 531 F.2d 83 (2d Cir. 1976); United States v. Miranda, 437 F.2d 1255 (2d Cir. 1971); O'Neil v. United States, 486 F.2d 1034 (2d Cir. 1973); United States v. Malcolm, supra; Rose v. United States, 513 F.2d 1251 (8th Cir. 1975).

This Court has specifically considered the circumstances which compel the District Court to hold a hearing in order to resolve claims of mental incompetency, United States v. Miranda, supra, 437 F.2d. at 1258, and has ruled that, where the movant has raised detailed and controverted issues of fact, an evidentiary hearing is required. See, also Floyd v. United States, 365 F.2d 368 (5th Cir. 1966); Nelms v. United States, 318 F.2d 150, 154 (4th Cir. 1963); United States v. Cannon, 310 F.2d 841 (2d Cir. 1962); Taylor v. United States, 282 F.2d 16 (8th Cir. 1960); O'Neil v. United States, supra.

Moreover, this Court has repeatedly reaffirmed its disinclination to sustain summary rejection of petitions for post-conviction relief supported by sufficient factual allegations, not clearly refuted by the files and records below. Taylor v. United States, 487 F.2d 307, 308 (2d Cir. 1973); Dalli v. United States, 491 F. 2d 758, 760 (2d Cir. 1974).

In this case, where the plea and sentence minutes affirmatively support Wojtowicz' contention that the District Court was already aware of his prior history of suicide attempts and psychiatric treatment, his newly-raised claim of a suicide attempt at sentencing, corroborated as it is by contemporaneous journalistic accounts, as well as his attorney's Rule 35 motion, presents a detailed and controverted factual question which may not be disposed of in summary fashion. United States v. Miranda, supra; Taylor v. United States, supra.

Indeed, the record before the Court below reveals substantial independent corroboration of Wojtowicz' claimed suicide attempt.

First, several contemporaneous news articles (including one submitted to the Court below) written by

reporters who attended the sentencing, specifically mentioned the suicide attempt and took notice of the blood-soaked bandages on Wojtowicz' wrists. Indeed, tne very news article before the Court below specifically mentioned Wojtowicz' grogginess and uneasiness at the sentencing.*

Second, Wojtowicz' attorney, in his Rule 35 motion, specifically drew the court's attention to Wojtowicz' "having inflicted injuries upon himself just prior to sentence" and referred to his "highly nervous state."

Third, and most important, Wojtowicz' pro se handwritten affidavit, despite its inartful draftsmanship, alleges specific precise factual allegations detailing the suicidal incident. Clearly, under Sanders v. United States, supra, this factual affidavit is more than sufficient, even absent the independent corroboration present in this case, to warrant an evidentiary hearing. It is clear that, where a factually sufficient affidavit has been submitted, and where reliance on matters outside the record is necessary to resolve the issue, an evidentiary hearing is required. Rose v. United States, supra.

---

* R. Wicker, The Boys in the Bank, supra; [Exhibit 11 (Appendix)].

Moreover, even where there has been facial compliance with the requirements of Rule 11, Federal Rules of Criminal Procedure, an evidentiary hearing may still be required.

In Fontaine v. United States, 411 U.S. 213 (1973), a case in which a federal prisoner had alleged his guilty plea had been coerced, the Supreme Court remanded for an evidentiary hearing, despite the fact that the District Court had technically complied with Rule 11 by inquiring into the plea's voluntariness. As the Court noted:

> the objective of [Rule 11], of course, is to flush out and resolve all such issues, but like any procedural mechanism, its exercise is neither always perfect, nor uniformly invulnerable to subsequent challenge calling for an opportunity to prove the allegations. Id., 411 U.S. at 215

Clearly, then, the Court below erred in summarily dismissing this §2255 proceeding without prior resort to an evidentiary hearing. Montgomery v. United States, 469 F.2d 148 (5th Cir. 1972); Bryant v. United States, 468 F.2d 812 (8th Cir. 1972); Nolan v. United States, 466 F.2d 522 (10th Cir. 1972); Young v. United States, 399 F.2d 689 (5th Cir. 1968); Floyd v. United States, supra.

B. Competence to Plead and be Sentenced

In light of Wojtowicz' suicide attempt at sentencing, his previous history of suicide attempts and psychiatric treatment, and the psychiatric implications of his bizarre involvement with, and dependence upon, his male paramour, serious question exists both as to the voluntariness of his guilty plea, and his competence at sentencing, where Judge Travia afforded him the opportunity to reconsider his guilty plea.

A defendant who enters a guilty plea simultaneously waives significant constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. In order for this waiver to be valid under the Due Process Clause, it must be "an intentional relinquishment of a known right or privilege", Johnson v. Zerbst, 304 U.S. 458 (1938). "Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." McCarthy v. United States, 394 U.S. 459, 466 (1969).

A plea which is the tainted produce of ignorance, incomprehension, coercion, terror, inducements, threats,

or promises is void as it cannot be said to be a knowing, free and rational choice of alternatives open to an accused and cannot be an intelligent waiver of constitutional rights. Boykin v. Alabama, 395 U.S. 238, 242 (1969); Sanders v. United States, supra; Machibroda v. United States, supra; Kercheval v. United States, 274 U.S. 220, 223 (1927).

No part of a plea or trial may be had against a defendant who is mentally incompetent, and any such resulting conviction is a violation of due process. 18 U.S.C. §4244; Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966); Dusky v. United States, 362 U.S. 402 (1960); Bishop v. United States, supra.

Moreover, an incompetent defendant may not properly be sentenced. Rule 32(a), F.R.Cr.P. Saddler v. United States, supra; United States v. Malcolm, supra. Otherwise a defendant's right of allocution and opportunity to provide the court legal cause warranting vacatur of his conviction would be meaningless. 18 U.S.C. §4244.

The oft-cited test of competence to stand trial is the standard enunciated in Dusky v. United States, supra 362 U.S. at 402:

> [T]he test must be whether [the accused] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him. Id.

Certainly, under the facts of this case, substantial doubt exists as to Wojtowicz' competence at sentencing, in light of his suicide attempt hours earlier. United States v. Miranda, supra. Irrespective of whether a suicide attempt is deemed a manifestation of mental illness, per se, it may hardly be questioned that it clearly reflects a state of extreme emotional disturbance and mental imbalance. Greenberg, Involuntary Psychiatric Commitments to Prevent Suicide, 49 N.Y.U.L. Rev. 227 (1974).

Moreover, in light of Wojtowicz' psychiatric background, his suicide attempt casts significant doubt upon his competence at plea, a scant two months earlier. As the Eighth Circuit has commented in this very context:

> . . . for the purposes of determining whether petitioner was competent to plead guilty to the federal charge, evidence of his mental state shortly after he pleaded guilty is just as relevant as evidence of his mental condition shortly before he pleaded guilty. Rose v. United States, supra, 513 F.2d at 1257 n.6.

This Court recently considered almost the precisely analogous situation in Saddler v. United States, supra. In Saddler, the defendant, who pleaded guilty after answering the Court's Rule 11 inquiry in a rational and coherent manner, was found to be incoherent at sentencing, two months later. This Court vacated Saddler's sentence outright, finding clear evidence of mental incompetence on the face of the record. The Court went on, moreover, to direct that further inquiry be made into Saddler's competence at the time of plea, a scant two months earlier, based upon the "flurry of warning flags" raised by Saddler's condition at sentencing. Id., 531 F.2d. at 86-87.

Clearly, under these facts, the Court below had an obligation to reinvestigate the circumstances of the instant plea, particularly where Judge Travia, at sentencing, impliedly revived the plea's viability by questioning Wojtowicz at length on his desire to withdraw it. Certainly, if the validity of the plea were revived at sentencing, as it was, and if Wojtowicz was incompetent to cope with the complex series of options presented him on that occasion, as appears likely,

the Court may well be warranted in vacating the guilty plea outright. Rose v. United States, supra; Saddler v. United States, supra.

The fact that Wojtowicz was found competent eight months prior to his suicide attempt has little bearing on his competence at plea and sentence. In Rose v. United States, supra, the Eighth Circuit held that, where a previously competent defendant was discovered incompetent eight months after plea, a hearing was still required to determine his condition at the time of the guilty plea.

Furthermore, the District Court is under an obligation to reinquire into a once-competent defendant's mental state should additional evidence come to light at later stages of the proceedings. Hansford v. United States, 365 F.2d 920 (D.C. Cir. 1966); Drope v. Missouri, supra, 420 U.S. at 181.

Indeed, the District Court has a continuing obligation to satisfy itself as to a defendant's mental state at all times, even absent objection by counsel. Tillery v. Eyman, 492 F.2d 1056 (9th Cir. 1974); Pate v. Robinson, supra.

Certainly, under the facts of this case, counsel's failure to bring Wojtowicz' suicide attempt to the sentencing judge's attention, outrageous though it may be, does not absolve the District Judge of the responsibility of exercising proper vigilance in determining sua sponte, whether something was amiss.

Wojtowicz stood before Judge Travia with blood-soaked bandages and manacles. He evinced obvious confusion and difficulty in dealing with the choices with which the District Judge confronted him - whether he should withdraw his plea, retain his present counsel, or ask the Court for a new attorney - matters which strike at the very heart of his "precious constitutional rights." Kloner v. United States, 535 F.2d 730, 733 (2d Cir. 1976). Under these circumstances, the sentencing court's failure to make adequate and specific inquiry into Wojtowicz' mental state at the time of his waiver of these rights is clear error.

Certainly, the federal courts have long recognized that, where waiver of constitutional rights is concerned, the trial court has a significant responsibility to carefully scrutinize the mental state of a defendant waiving such rights, even absent a claim of mental incompetency.

In Westbrook v. Arizona, 384 U.S. 150 (1966), the Supreme Court suggested that a defendant's competence to stand trial did not, in and of itself, establish his competence to waive his right to counsel and to represent himself. Hence, it determined that special inquiry must be made to assess the validity of that waiver. See, also United States ex rel Martinez v. Thomas, 526 F.2d 750 (2d Cir. 1975); United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964).

Relying upon Westbrook, the Ninth Circuit in Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973), held that, even though a defendant may, in fact, be competent to stand trial, he may not be sufficiently competent to plead guilty. Sieling went on to state that neither petitioner's pre-trial competency hearing nor the colloquy conducted before entry of his guilty plea sufficiently established his competency to make the "reasoned choice" which the court deemed essential to the validity of the guilty plea and the waiver of constitutional rights entailed in such a plea.

The Sieling court adopted the standard first formulated by Judge Hufstedler in her dissent in Schoeller v. Dunbar, 423 F.2d 1183, 1194 (9th Cir.),

cert. denied, 400 U.S. 834 (1970):

> A defendant is not competent to plead guilty if mental illness has substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the nature of the consequences of his plea. Id.

Similarly, in In Re Williams, 165 F. Supp. 879, 881 (D.D.C. 1958), the district court held that, "The issues involved in the plea of guilty and the consequences which attach to a plea require a greater degree of awareness than the competency to stand trial." See, also McCoy v. United States, 363 F.2d 306, 307 n.3 (D.C. Cir. 1966).

Relying upon the Westbrook rationale, Judge Bazelon, in United States v. David, 511 F.2d 355, 362 n. 19 (D.C. Cir. 1975), held the trial court's competency finding insufficient, in and of itself, to establish that the defendant had made a knowing and voluntary waiver of his right to a jury trial. Although agreeing that the defendant's level of awareness and comprehension may have been high enough to render him competent to stand trial, the Court concluded that it may not have been high enough to allow him to waive his constitutional rights or that it may have called for a more detailed explanation of the nature of those rights. See In Re Williams, supra; Drope v. Missouri, supra, 420 U.S. at 182.

Moreover, in United States v. Masthers, 539 F.2d 721 (D.C. Cir. 1976), the D.C. Circuit has reiterated only recently its position that, where a defendant's mental condition is placed in issue, any waiver of constitutional rights, under the circumstances, must be scrutinized with more painstaking care than is customary under the usually perfunctory Rule 11 colloquy.

The Masthers Court, per Judge Bazelon, held that neither defendant's failure to raise the competence issue prior to sentencing, the trial court's personal observations of defendant, nor defendant's apparent understanding of the proceedings as evidenced by affirmative responses during the Rule 11 colloquy was sufficient to dispense with an evidentiary hearing on the question of his competence to waive his constitutional rights. Thus, Masthers held that, even where a defendant may not be legally incompetent, he may be sufficiently mentally impaired to require the District Court to make a more thorough inquiry than is customary.

Furthermore, this Circuit has itself mandated detailed inquiry into a defendant's mental state even absent a claim of incompetency in circumstances in which there was serious question as to the defendant's capacity

to waive certain rights. United States ex rel Martinez v. Thomas, supra (voluntariness of waiver of counsel); United States v. Silva, 418 F.2d 328 (2d Cir. 1969) (voluntariness of confession); United States v. Plattner, supra (voluntariness of waiver of counsel); see, also People v. Dumas, 51 Misc. 2d 929, 274 N.Y.S. 2d 764 (Sup. Ct. 1966).

Certainly, it is plain that the usual plea colloquy is generally inadequate in properly ascertaining a defendant's mental state:

> While such an inquiry, insofar as it is meant to probe the defendant's intention and understanding, might properly be concerned with his actual state of mind, it usually consists instead primarily of the determination that no external factors existed which could have unfairly influenced the guilty plea decision. Although the court is obligated to ask whether the defendant understands the charges and the consequences of pleading guilty, to explain them if he does not, and to inquire whether he has been subjected to threats or coercion, the court may accept his answers to these questions if they indicate an absence of coercion or undue influence; the defendant does not have to demonstrate his comprehension. Furthermore, in the ordinary case no inquiry into the defendant's mental capacity to make the plea is required -- he is presumed sane. Commentators agree that this colloquy is neither designed for nor adequate for ascertaining mental incompetence. Note, Competence to Plead Guilty: A New Standard, 1974 Duke L.J. 149, 158-59 (Emphasis in original).

Moreover, the customary sentencing colloquy, consisting primarily of the defendant's allocution, is even less suited to ferret out psychiatric difficulties. Saddler v. United States, supra; United States v. Malcolm, supra.

Clearly, when a defendant's mental condition is called into serious question, the scope of judicial inquiry necessarily must go beyond the minimal requirements of Rules 11 and 32, F.R.Cr.P. Rule 11 "requires something more than conclusionary questions phrased in the language of the Rule. It contemplates such an inquiry as will develop the underlying facts from which the court will draw its own conclusions." United States v. Kincaid, 362 F.2d 939, 941 (4th Cir. 1966).

In the instant case, no such development of the underlying facts took place. Counsel neglected to bring Wojtowicz' suicide attempt to the court's attention. The court, for its part, seemingly ignored all "warning flags" that something was seriously amiss ("warning flags", incidentally, that were not lost upon the reporters attending the sentencing). In light of the extensive colloquy between the sentencing judge and Wojtowicz regarding his guilty plea and desire to substitute counsel, Judge Travia's failure to make specific

inquiry regarding Wojtowicz' mental state, on this record, was clear error, warranting vacatur of Wojtowicz' conviction. United States v. Masthers, supra; United States ex rel Martinez v. Thomas, supra.

C. Voluntariness of the Plea

The District Court erred in dismissing, without an evidentiary hearing, Wojtowicz' claim that his guilty plea was the product of the coercion of his family, particularly Ernest Aron, Wojtowicz' paramour. Upon the facts of the case, this claim presents a substantial question which may not be resolved absent an evidentiary hearing.

According to the uncontradicted affidavits submitted to the Court below, Aron, as well as Wojtowicz' mother and wife, exerted pressure upon him to plead guilty, based, in part, upon counsel's promise that Wojtowicz would receive no more than a 10- to 15-year sentence.

Wojtowicz himself alleged that the influence of Aron and his family was the primary motivating force behind his guilty plea. Indeed, the news account, submitted to the Court below, recounted in detail the manner

in which Aron inveigled and induced Wojtowicz to plead guilty with threats of his imminent desertion should Wojtowicz go to trial and receive a heavy sentence. (Exhibit 11, Appendix). These facts were confirmed by Wojtowicz at sentencing, when he attempted to convince the Court that he acquiesced in his prior plea so as not to lose Aron. (Sentence Minutes, at 15).

Moreover, the above news article recounted in detail the manner in which Aron was purported to have improperly coached Wojtowicz to properly answer the Court's Rule 11 colloquy at the plea proceeding by nodding his head at appropriate questions.

These facts clearly raise the chilling spectre of undue influence exerted upon Wojtowicz in order to induce his guilty plea, in light of his weakened mental condition and his dependent relationship with his paramour, Aron. Under these circumstances, where a significant likelihood exists that Wojtowicz' will was overborne by virtue of his mental state, and his plea was induced and coerced by his paramour, a substantial question as to the plea's voluntariness has been raised, which may not be resolved absent an evidentiary hearing.

United States ex rel. Brown v. LaVallee, 424 F.2d 457 (2d Cir.), cert. denied, 401 U.S. 942 (1970) is not to the contrary. In Brown, this Court held that the mere fact that family members exerted pressure upon the defendant to plead guilty did not render the resulting plea involuntary. "In the mouths of the prosecutor or trial judge, these statements might have been coercive; coming from [defendant's] lawyers and his mother they were sound advice."* Id., 424 F.2d at 461. See also United States ex rel. Curtis v. Zelker, 466 F.2d 1092 (2d Cir. 1972), cert. denied, 410 U.S. 945 (1973).

However, Brown makes explicitly clear that, where a defendant's mental competence is at issue, as here, the Court's consideration must be focused on a much broader plane. This Court stated, per Judge Lumbard, that, where

---

* It is interesting to contrast the Courts' attitude toward the use of family members to induce guilty pleas with their attitude toward the use of family members to induce out-of-court confessions. See Culombe v. Connecticut, 367 U.S. 568, 630 (1961) (Frankfurter, J., concurring) (condemning "the crude chicanery of employing persons intimate with an accused to play upon his emotions"). Brown and its rationale comes in for severe criticism from Professor Altschuler, see Altschuler, The Defense Attorney's Role in Plea Bargaining, 84 Yale L.J. 1179, 1192-1194 (1975).

the atmosphere surrounding the decision to plead was so fraught with emotional pressures as to deprive a defendant of his ability to reason or his competence to decide rationally, any resulting plea was clearly involuntary. Id. 424 F.2d at 460 n.4.

This case clearly fits into that exceptional category. The facts reveal that Wojtowicz was pressured by Aron to plead guilty out of fear his paramour would leave him. The decision to plead occurred after a contact visit with Aron at West Street, arranged by Wojtowicz' attorney (Sentencing Minutes, at 13-14). Furthermore, serious allegations have been raised concerning whether Aron, in fact, coached Wojtowicz at the plea proceedings.

Under these unique circumstances, Wojtowicz' claims of undue influence and coercion in persuading him to plead guilty are substantial. It was error for the District Court to have dismissed this claim without an evidentiary hearing. United States ex rel. Curtis v. Zelker, supra.

D. Sentence Promise

The Court below erred in dismissing, without an evidentiary hearing, Wojtowicz' claim, confirmed by his family, that his guilty plea was induced by his attorney's sentence-promise that he would receive only 10 to 15 years imprisonment. In light of his family's corroboration of this promise, as well as their admission that, in relying on it, they pressured him to plead guilty, Wojtowicz' claim that his guilty plea was fraudulently induced is substantial and warrants an evidentiary hearing.

The Court below dismissed Wojtowicz' claim, stating that, where it was not explicitly clear that the alleged sentence-promise was purportedly conveyed from the court or prosecutor, any representation by the attorney could be nothing more than an erroneous sentence-estimate, which would not entitle Wojtowicz to relief. Such a ruling was clear error.

When a promise is, in fact, conveyed to a defendant by his attorney, charged with representing his interests, it is not unreasonable for him to place great reliance upon the representations made to him. Where that promise is broken, or where the defendant is affirmatively misled, however, he should not be forced

to suffer because of his naive reliance. As Judge Weinstein has written, in this context:

> [V]oluntariness connotes a state of mind of an actor. If the actor -- i.e., the defendant -- believes that a promise has been made, the effect on his state of mind is exactly the same as if such a promise had in fact been made.
>
> * * *
>
> It cannot always be assumed that the presence of counsel automatically insures that the defendant has not been misled into pleading guilty. Recent writings suggest that there are instances where defense counsel have considered their own rather than their clients' interest in disposing of a case by guilty plea.
>
> United States ex rel. Thurmond v. Mancusi, 275 F. Supp. 508, 516, 518 (E.D.N.Y. 1967).

Clearly, had Wojtowicz, alone, alleged his own subjective mistaken impression regarding the promised sentence, the District Court's holding may not have been clearly erroneous. However, in this case, three family members submitted affidavits to the Court below affirming that they, too, were under the same subjective mistaken impression from Wojtowicz' attorney. Based upon this alleged promise, they exerted pressure upon Wojtowicz to plead guilty, as described supra.

This Court has sustained two recent district court determinations that guilty pleas were involuntarily entered where family members provided substantial objective evidence confirming that they, too, were privy to the alleged sentence-promise conveyed by defendant's attorney. Mosher v. LaVallee, 351 F. Supp. 1101 (S.D.N.Y. 1972), aff'd, 491 F.2d 1346 (2d Cir.), cert. denied, 416 U.S. 906 (1974); United States ex rel. Oliver v. Vincent, 498 F.2d 340 (2d Cir. 1974); cf. United States ex rel. Curtis v. Zelker, supra.

Under these circumstances, and in light of the independent corroboration offered by his family, it was error to dismiss Wojtowicz' claim that his attorney conveyed a sentence-promise without first affording an evidentiary hearing. Mosher v. LaVallee, supra.

POINT II

WOJTOWICZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

The District Court erred in failing to consider Wojtowicz' related claim that, in light of the foregoing, he was denied his Fifth and Sixth Amendment rights to the effective assistance of counsel, because of his attorney's failure to raise critical issues at sentencing and plea, counsel's obvious lack of research, preparation and exploration of possible defenses, and his attempts to pressure a guilty plea. On the basis of this record, such claims are substantial and warrant an evidentiary hearing.

It is, by now, familiar dictum "that the right to counsel is the right to the effective assistance of counsel." Rastrom v. Robbins, 319 F. Supp. 1090, 1092 (D. Me. 1970) (Gignoux, J.) (and cases cited therein). Irrespective whether he pleads guilty or goes to trial "[n]o defendant can be said to have 'his day in court' unless he had effective assistance of counsel on that day." Bazelon, The Defective Assistance of Counsel, 42 Univ. Cin. L. Rev. 1, 27 (1973).

Under the circumstances of this case, a pattern emerges that reflects not merely counsel's persistent failure to zealously protect Wojtowicz' rights, but a failure, as well, to reasonably explore possibly fruitful areas of defense before allowing his client to plead guilty. United States ex rel. Thomas v. Zelker, 332 F. Supp. 595 (S.D.N.Y. 1971) (Frankel, J.). Under these circumstances, a hearing is required to consider these very substantial claims.

Sentencing

Counsel's failure, at sentencing, to draw the Court's attention to his client's suicide-attempt hours earlier represents conduct so outrageous as to render the proceedings the proverbial "farce and mockery of justice." United States ex rel. Marcelin v. Mancusi, 462 F.2d 36, 42 (2d Cir. 1972), cert. denied, 410 U.S. 917 (1973) (and cases cited therein); United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950).

Wojtowicz was brought into court in bandages and manacles. Reporters attending the proceeding took note of the blood-soaked bandages and reported on the suicide attempt (see New York Times, supra). Yet defense counsel made no mention of the fact whatsoever.

Moreover, the sentencing minutes reveal that counsel was more concerned with defending himself from Wojtowicz' allegations of ineffective representation than in actively representing Wojtowicz before Judge Travia. The sentencing proceeding, consisting of extended colloquys between the Court and Wojtowicz concerning the withdrawal of his guilty plea and dissatisfaction with counsel, was conducted in such a manner as to render Wojtowicz virtually without counsel for the moment. Clearly, he did not wish his present attorney to continue representing him. His attorney, indeed, seemed more concerned, at that moment, with defending himself than continuing to represent Wojtowicz' interests. Such abrogation of counsel's responsibility was all the more deleterious in this case, where a recent suicide attempt cast grave doubts upon his client's present competence.

Nor may it reasonably be argued that his attorney was "unaware" of the suicide attempt. The attending reporters were aware of it from their Courtroom observations, and the sentencing minutes reveal that his mother cried out when she saw him in this condition. (Sentence Minutes, at 3).

Moreover, counsel included the fact of the suicide attempt in his Rule 35 Motion to the Court filed four months later. Clearly, such facts should more properly have formed the basis for a motion to withdraw the plea on the grounds of incompetence. Rule 32(d). F.R.Cr.P.; United States v. Joslin, 434 F.2d 526, 531 (D.C. 1970); United States v. McGirr, 434 F.2d 844 (4th Cir. 1970).

It seems obvious that counsel's failure to bring his client's suicide attempt to the Court's attention deprived this possibly-incompetent defendant of the effective assistance of counsel at sentencing. Gadsden v. United States, 223 F.2d 627 (D.C. Cir. 1955); United States v. Martin, 475 F.2d 943, 954 (D.C. Cir. 1973) (Bazelon, J.,dissenting); Bazelon, The Defective Assistance of Counsel, supra, at 33-34.

Ignorance of Death Penalty

Counsel's expressed ignorance at plea, after six months of representation, that his client faced a possible death penalty on one count of the indictment, and his admission, confirmed by Wojtowicz at sentencing, that the first time he informed his client of this fact was the morning of plea, reveals such gross ineptitude as to render his representation constitutionally defective.

Counsel's ignorance that his client faced the death penalty may not be excused by hasty preparation or belated appointment by the Court. Counsel was appointed at the time of Wojtowicz' initial arrest in August, 1972. He did not plead guilty until February, 1973, six months later. Clearly, where the indictment explicitly enumerated the statute under which each count was brought, it seems hardly to be asking too much of counsel to read the statute. See Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527 (1947).

Admittedly, Wojtowicz did not plead to that count, and it was dismissed after he pleaded to another count. However, it is manifest that counsel's ignorance of the death penalty fatally flawed the advice given to his client, as he had obviously misconceived the thrust of the government's case and the possible penalties involved.*

Clearly, counsel's ignorance betrayed such a lack of research as to fatally flaw the advice given to Wojtowicz.

---

* Irrespective whether the statute was likely to be invoked in this case, given the law's state of flux at that time (see Furman v. Georgia, 408 U.S. 238 (1972)), or of the statute's ultimate constitutionality (compare 18 U.S.C. § 2113(e) with United States v. Jackson, 390 U.S. 570 (1968)), the fact that the possibility existed required a far greater degree of research and reflection on the part of counsel, and consideration by the defendant, than that gained in a brief morning's encounter.

Failure to Explore Insanity Defense

Counsel's failure to fully explore the possibility of an insanity defense before recommending that his client plead guilty is another example of failure to provide constitutionally-effective representation.

The record does not reflect that counsel made any application to the Court, pursuant to 18 U.S.C. Sec. 3006A(e), for the appointment of a defense psychiatrist to assist in exploring the viability of raising an insanity defense -- the only possible defense, under the circumstances, and one that presented significant possibilities. Moreover, at sentencing, counsel stated that, in light of the guilty plea, there would no longer be any need to hire a psychiatrist. (Sentence Minutes, at 18).

Furthermore, counsel admitted that, after the October, 1972 Kings County determination of competency, he thereafter began to explore the prospects of a guilty plea with Wojtowicz, without acquiring an independent psychiatric opinion, either as to present competence or mental responsibility at the time of the crime. (Sentence Minutes, at 17).

To assess the viability of a mental capacity defense, a psychiatric expert is critical. In this context, the Fifth Circuit, in United States v. Edwards, 488 F.2d 1154 (5th Cir. 1974) noted the "critical interrelationship between expert psychiatric assistance and minimally effective representation of counsel." See United States v. Alvarez, 519 F.2d 1036 (3d Cir. 1975); Hintz v. Beto, 379 F.2d 937 (5th Cir. 1967).

Whether or not the defendant wished to plead guilty, counsel was under a duty to make every effort to investigate the viability of every possible line of defense before advising a client on the options open to him. Admittedly, counsel may not force an insanity defense on an unwilling client. Lynch v. Overholser, 369 U.S. 705 (1962). However, the viability of such a defense must still be explored beforehand. At a minimum, a lawyer must investigate all aspects of a case, whether or not his client wishes to plead guilty. Bazelon, The Defective Assistance of Counsel, supra at 34.

At a minimum, counsel can render effective assistance only if he has the necessary time, ability and resources to conduct a factual and legal investigation, confer with his client and, after reflection, prepare potential defenses. Wolf v. Britton, 509 F.2d 304 (8th

Cir. 1975). See Waltz, Inadequacy of Trial Defense Representation as a Ground for Post Conviction Relief in Criminal Cases, 59 Nw. U. L. Rev. 289 (1964).

The facts here fail to reveal that counsel conducted any significant exploration of the insanity defense in the six months before plea. Under the facts of this case, where the one significant defense available went unexplored, Wojtowicz has been denied constitutionally-effective assistance of counsel.

Negotiation of Movie Rights

At sentencing, Wojtowicz asked that his attorney be replaced because, inter alia, he was more concerned with negotiating the movie and book rights to the crime than in representing Wojtowicz' interests.*

This Court only recently considered a not-dissimilar claim in the context of a negotiated plea bargain in which defense counsel received a generous reward for their efforts. The Court strongly condemned such conduct, stating:

---

* Counsel "negotiated" the rights to the movie, which has grossed, to date, over $20 million, for the paltry sum of $7,500.

> . . . the [attorneys'] conduct . . . might . . . raise a further claim of ineffective assistance of counsel. We cannot condone the questionable practice of negotiating plea bargains, thereby advising clients to plead guilty, while at the same time collecting rewards from insurers.
>
> Palermo v. Warden, Green Haven State Prison, ___ F.2d ___, Dkt. No. 76-2055 (2d Cir. November 1, 1976) at 5952,n.10.

Such concern similarly applies to the instant case. Wojtowicz' attorney, formerly court-assigned, became privately-retained out of the proceeds of the sale of the movie rights, which he negotiated. Clearly, in light of counsel's failure to hire a psychiatric expert, where funds were presently available for such purpose, critical questions concerning counsel's zealous advocacy of his client's cause are raised.

Sentence Promise

If, indeed, counsel in fact did make an erroneous sentence promise to Wojtowicz and his family as an inducement for him to plead guilty, as discussed supra, it seems clear that, alternatively, he was denied effective assistance of counsel. Mosher v. LaVallee, supra; United States ex rel. Oliver v. Vincent, supra.

It is manifest, as the above makes clear, that serious question is raised regarding the zeal and competence with which Wojtowicz was represented at plea and sentence. Such claims, taken individually or in their totality, cast doubt upon whether counsel's conduct has, in effect, blotted out the essence of a substantial defense or protected Wojtowicz' interests in the constitutionally required manner. Testamark v. Vincent, 496 F.2d 641 (2d Cir. 1974).

Under the unique facts of this case, the matter must be remanded for an evidentiary hearing on this issue.

CONCLUSION

For the reasons stated above, the order of the District Court should be reversed and the matter remanded for an evidentiary hearing.

Dated: New York, New York
November 19, 1976

Respectfully submitted,

EDWARD M. CHIKOFSKY
Attorney for Appellant
John Stanley Wojtowicz
410 Park Avenue
New York, New York 10022
(212) 355-2380

C 321—Affidavit of Service by Mail.
Affirmation of Service by Mail on Reverse Side.

United States Court of Appeals
for the Second Circuit

JOHN STANLEY WOJTOWICZ

Plaintiff

against

UNITED STATES OF AMERICA

Defendant

Index No. 76-2106

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 69-84 137th Street, Flushing, New York.

That on the 19th *day of* November *19* 76 *deponent served the annexed* brief and appendix

on United States Attorney, Eastern District of New York

attorney(s) for appellee

in this action at 225 Cadman Plaza East, Brooklyn, New York

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me

this 19 *day of* November *19*76

Judy Gerowitz

The name signed must be printed beneath

Judy Gerowitz

JOSEPH D. [illegible]
Notary Public, State of New York
No. [illegible]
Qualified in [illegible] County
Commission Expires March 30, 1977

C 321—Affirmation of Service by Mail.
Affidavit of Service by Mail on Reverse Side.

Index No.

Plaintiff

against

Defendant

ATTORNEY'S
AFFIRMATION OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

That on the day of 19 deponent served the annexed

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated this day of 19

The name signed must be printed beneath

Attorney at Law